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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 497

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, AND JOHN L. LEWIS, President of Said Union,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, International Union, United Mine Workers of America (hereinafter called Union), and John L. Lewis, President of said Union, and each of them, pray that a writ of certiorari issue to review the Decree of the United States Court of Appeals for the District of Columbia Circuit in said case, entered on the 19th day of October, 1950

(R. 280)*, enforcing as modified a decision and order of the National Labor Relations Board (hereinafter called Board), entered on the 27th day of May, 1949. (R. 29).

OPINIONS BELOW.

The decision and order of the National Labor Relations Board appears at page 29 of the record and is reported in 83 Decisions and Orders of the National Labor Relations Board 916. The opinion of the Court of Appeals appears at page 276 of the record, and is reported in 184 Fed. 2d 392.

JURISDICTION.

The Decree of the Court of Appeals was entered on the 19th day of October, 1950. (R. 280).

The jurisdiction of this Court is invoked under Title 28, U. S. C. A. Sec. 1254, (Act of June 25, 1948, chap. 646, 62 Stat. 928) and 28 U. S. C. A. 2101 (June 25, 1948, c. 646, 62 Stat. 961, amended May 24, 1949, c. 139, Sec. 106, 63 Stat. 104).

QUESTIONS PRESENTED.

Petitioners, and each of them, say that the Board and the Court of Appeals erred in their respective rulings, findings, conclusions and decrees as they relate to the questions presented in this Case which follow:

A. Was the Board's finding and conclusion of law that petitioners attempted to cause and caused the companies to execute an agreement containing an invalid union-shop provision and thus to discriminate against employees within the meaning of Section 8(a)(3) of the Labor-Management Relations Act, 1947 (Act, June 23, 1947, c. 120, Section 1, *et seq.*, 61 Stat. 136, *et seq.)* (hereinafter called the "Act") and in violation of Section 8(b)(2) thereof, supported by the substantial evidence on the record considered as a whole?

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* The symbol "R" as used herein refers to the printed record.

1. Did the Board err in its finding and conclusion of law that petitioners had discriminated against employees within the meaning of Section 8(a)(3) of the Act?

a. Can there be a violation of Section 8(b)(2) in the absence of a showing and finding that petitioners have caused or attempted to cause discrimination against some specified employee or group of employees?

b. Did the Board's finding and conclusion of discriminatory conduct ignore, and were they contrary to, the union-shop provisions contained in the 1948 Agreement, and the Agreements prior thereto, between the Union and the captive mines?

c. Was there factual basis for the Board's finding of discrimination, and did the undisputed evidence show that the employees of the Companies authorized and approved the union-shop provisions of the 1948 Agreement?

d. Did the employee's authorization of, and approval of, the union-shop provisions of the 1948 Agreement obviate the necessity of a unon-shop authorization election under Section 9(e)(1) of the Act?

2. Did the Board err in its finding and conclusion of law that petitioners, "by attempting to cause and causing the Companies to execute an unauthorized union-shop agreement, violate Section 8(b)(2) of the Act"?

a. Was there competent evidence to support the Board's finding and conclusion of law that petitioners resorted to strike action to support their demands; and were the matters relied upon by the Board in support thereof sufficient in law?

b. Did the Board err as a matter of law in holding petitioners responsible for the mine workers' abstaining from work?

c. Was petitioners' conduct in requesting a union shop consonant with the constitutionally guaranteed right of collective bargaining? Was execution of the 1948 Agreement by the captive mine operators voluntary on their part and without compulsion on the part of petitioners?

B. Did the Board commit prejudicial error in affirming the trial examiner's rulings in admitting evidence offered by the Board and in rejecting evidence offered by petitioners? Did such errors require that the Court of Appeals set aside the Board's findings of fact, conclusions of law and portions of its Order complained of herein?

C. Are paragraphs 1(b) and 1(c) of the Board's order beyond its power and jurisdiction? And did the Court of Appeals have jurisdiction or power to enforce said paragraphs?

D. Should the Court of Appeals have dismissed this case against petitioners as moot? Were paragraphs 1 (a), (b) and (c) of the Order beyond the Board's power and jurisdiction?

E. Are Sections 8(a)(3)(ii) and 8(b)(2) of the Act and the Board's Order, as complained of by petitioners, void because they are in conflict with the First, Fifth and Thirteenth Amendments to the Constitution of the United States?

F. Did the Board have jurisdiction in this case?

G. Did the Board err in not sustaining petitioners' motion to dismiss?

H. Did the Board err in denying petitioners' motion to strike the Intermediate Report and Recommended Order,

and the entire record and to remand the case before an examiner legally and properly qualified under the Administrative Procedure Act of 1946 (5 U. S. C. A. 1001-1011)?

I. Did the Court of Appeals err in agreeing with the decisions and conclusions of the Board and granting its Enforcing Decree of the Board's order as modified?

STATUTES INVOLVED.

The pertinent statutory provisions are printed in Appendix A, infra, at pages 29-32.

STATEMENT.

On July 8, 1948, Board's General Counsel on behalf of the Board issued a complaint against International Union, United Mine Workers of America (hereinafter called "Union") and John L. Lewis, President of said Union, charging them with acts which "constitute unfair labor practices affecting commerce within the meaning of Section 8, subsections (b)(1)(A), (b)(2) and (b)(3), and Section 2, subsections (6) and (7) of the National Labor Relations Act, as amended, Public Law 101 80th Congress, First Session (hereinafter called the "Act").[1] (R. 199)

In its Decision and Order, dated May 27, 1949, the Board dismissed (R. 39) the complaint, as amended at the hearing, in so far as it alleged that Union and Lewis, President thereof, had engaged in unfair labor practices in violation of said Sections 8(b)(1)(A) and 8(b)(3), but found (R. 34) that they had violated said Section 8(b)(2) and required that petitioners cease and desist from certain conduct, and that they take certain affirmative action, all as specified in said Order (R. 37).

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[1] The Act is also cited as the "Labor-Management Relations Act, 1947" (Act, June 23, 1947, C. 120. Section 1 et seq., 61 Stat. 136 et seq.)

On June 6, 1949, Petitioners, asserting that both Union and Lewis, President thereof, transact business in the District of Columbia, and that each of them is a person aggrieved by certain portions of said order within the meaning of Section 10(f) of the Act and that said Order is a final order of the Board, filed their Petition for review Of and to Set Aside Designated Portions of said Order, as provided for in, and pursuant to, said Section 10(f) (R. 2). On July 5, 1949, the Board filed its answer, praying that the Court deny said petition to review and that it enforce in whole said Board's order. (R. 70-77). On July 17, 1950 the Court of Appeals handed down its opinion (R. 276). On October 19, 1950 the Court of Appeals entered its decree enforcing the order of the Board as modified (R. 280).

A. Kind of Proceeding.

Upon the charges filed by Jones & Laughlin Steel Corporation and seventeen other Companies (known in the bituminous coal industry as operators of "captive mines" and herein called "Companies") complaint as aforesaid was issued. Hearing thereon was had before a Trial Examiner who issued his Intermediate Report and Recommended Order (R. 47) to which petitioners filed exceptions. (R. 253). On May 27, 1949, the Board issued its Decision and Order, (R. 29), affirmed the Trial Examiner's rulings, and adopted "the findings, conclusions, and recommendations of the Trial Examiner" with certain noted modifications (R. 30) and found and concluded that petitioners "without complying with prescribed statutory authorization procedures, and in violation of Section 8(b)(2) of the Act, attempted to cause and caused the Companies to execute an agreement containing an invalid union-shop provision and thus to discriminate against employees within the meaning of Section 8(a)(3) of the Act." (R. 30).

The order of the Board required that the Union and its officers, representatives and agents, including John L. Lewis, its President, shall:

"1. Cease and desist from: (R. 37)

"(a) Requiring, instructing, or inducing its representatives to require that the Companies execute contracts which make membership in International Union, United Mine Workers of America, a condition of employment, except in accordance with the provisos in Section 8(a)(3) of the Act;

"(b) Directing, instigating, or encouraging employees to engage in a strike, or approving or ratifying strike action taken by employees, for the purpose of requiring that the Companies execute contracts which make membership in International Union, United Mine Workers of America, a condition of employment, except in accordance with the provisos in Section 8(a)(3) of the Act;

"(c) Causing or attempting to cause the Companies to execute contracts which make membership in International Union, United Mine Workers of America, a condition of employment, except in accordance with the provisos in Section 8(a)(3) of the Act, or in any other manner to discriminate against employees in violation of Section 8(a)(3) of the Act;

"(d) In any manner maintaining, enforcing or giving effect to the union-shop clause in its contract with the Companies so long as the said clause does not conform with the provisos in Section 8(a)(3) of the Act."

The Board's Order also provided in Paragraph 2, subparagraphs (a), (b) and (c) that petitioners take "affirmative action which the Board finds will effectuate the policies of the Act", which required that petitioners post at designated places copies of the notice attached to said Order; that copies thereof, after being signed by an official representative of Union and "individually" by Lewis, be posted and maintained for 60 consecutive days; that petitioners mail to the Board's Regional Director signed copies for posting on the Companies' bulletin boards; and that petitioners notify the Director, in writing, what steps they have taken "to comply herewith."

On June 6, 1949, petitioners filed their petition to review and set aside the above-quoted portions and Paragraph 2, subparagraphs (a), (b) and (c) of the Order. The Court of Appeals refused to set aside such portions and granted enforcement of said Order with the exception of paragraph (d) thereof. (R. 279).

B. The Pleadings and Procedures.

The Complaint, as originally filed (R. 199) and as amended (R. 212) charged, among other matters, that the Union and Lewis, President thereof, had violated Section 8(b)(3) and Section 8(b)(1)(A) of the Act; but since the Board in its Order of May 27, 1949, dismissed the Complaint, as amended, insofar as it related to said charges (R. 39), discussion thereof is deemed unnecessary.

Pertinent, however, to the issues before the Court is the charge in Paragraph IX of said original complaint that "from on or about June 22, 1948, and continuously down to and including the date of the issuance of the Compaint," petitioners, and each of them, "have attempted and continue to attempt to cause the Companies, and each of them, to discriminate against their employees by insisting and seeking to compel the Companies, and each of them, to enter into an effective union shop contract, requiring all persons employed by the Companies and each of them, to be or become members of the Union, without certification by the Board that at least a majority of the eligible employees of the Companies, or each of them, voting in the most recent election held as provided in Section 9, subsection (e) of the Act, had voted to authorize the Union to make an effective union shop contract" thereby engaging in unfair labor practices within the meaning of Section 8(b)(2) of the Act. (R. 202-203).

Petitioners filed a Motion to Dismiss Complaint and an Answer to Complaint (R. 205). In said Motion, they raised constitutional and jurisdictional questions, as well

as the sufficiency of the complaint.[2] In said Answer, they denied that they had engaged in unfair labor practices as charged in the Complaint, denied the above-mentioned averments, and averred in substance:

That petitioners had bargained collectively in good faith with the Companies; that on July 13, 1948, the Companies and Union executed the National Bituminous Coal Wage Agreement of 1948 containing the union shop requested by the Union; that the union shop, contained therein, was initially agreed upon between Union and the Companies in the negotiation and execution of the 1941 wage agreement and was in each succeeding wage agreement since that time, including the National Bituminous Coal Wage Agreement of 1947 which expired on June 30, 1948; that all the employees affected by said provision in the 1948 Agreement were Union members when the 1947 Agreement expired, and so far as petitioners "are informed and know," no employee "has withdrawn or attempted to withdraw from union membership since the said termination date"; that, in conformity with Union's Constitution, the Union's Scale Committee, at a convention authorized by said Constitution established for the Union and its members a National Policy Committee to effectuate the wage policy therefor and clothed it with authority to deal with all matters in the making of basic wage agreements, and the 1948 Agreement was negotiated, approved and affirmed by said Committee, as representatives of said employees and Union's members; and that in negotiating and executing said 1948 Agreement, petitioners were acting within the scope of authority delegated to them by and under the instruction of said employees, as members of Union, and that Union's request for the union shop was in law and in fact a discharge of the mandate of and from Union's membership to their repre-

[2] Union and Lewis, its President, incorporated in their Answer to the Complaint, all statements and defenses contained in their Motion to Dismiss (R. 210-211).

sentatives for the negotiation of a wage agreement containing the union shop. (R. 207-8).

Petitioners averred also that neither the Complainant nor the Companies have contended otherwise than that the miners would vote overwhelmingly for the union shop; that the individual employees of said Companies, who are members of Union, with knowledge of the union shop dispute, in their own right and in protest to Companies' refusal to accept said 1948 Agreement (including the union shop), refused to return to work for the Companies after termination of their vacation on July 6, 1948; that although, as petitioners are informed, believe and say, said employees, or a large number of them, were advised by their employer or employers prior to the date on which the Companies executed said 1948 Agreement that employment was available to them upon terms and conditions consonant with the National Bituminous Coal Wage Agreement of 1948, other than the union-shop provision, and said employer or employers were willing to adopt the "Union Shop provision, provided it does not become effective until authorized in the manner specified in the law," said miners refused, and continued to refuse, to return to work until the Companies executed the 1948 Agreement providing the union shop; that it was only then that said employees resumed production of coal (R. 209); that petitioners are without knowledge of complaint from any of said employees of Union's demand for the union shop contained in the 1948 Agreement, but that, on the contrary, the conduct of said employees in remaining away from work and in not complaining of Union's demand were tacitly an approval of Union's request for the union shop (R. 209), and that the charge that petitioners "have restrained and coerced and are restraining and coercing employees of the Companies in the exercise of rights guaranteed in Section 7 of the Act" is without foundation in fact and is wholly contrary to the facts and desires of said employees; and

that since the resumption of work by said employees coal was produced under said 1948 Agreement without dissidence of the union-shop issue from any of said employees. (R. 210). Petitioners averred that Union, "as evidence of its good faith and that its request was wholly with the authority and consent of said employees," offered to furnish the Companies authorizations signed by said employees showing their written approval of the Union's request, which offer Companies' representatives rejected. (R. 210).

The Trail Examiner granted leave to amend the complaint. (General Counsel's Exhibit No. 1-F, (R. 212)).

Paragraph IX-A charged that "On June 25, 1948, the Respondents and representatives of the bituminous coal producers, other than the Companies, entered into an agreement effective July 1, 1948, which renewed and contained in effect certain provisions of the previous agreement, including a clause requiring all the employees covered by the agreement to be or become members of the Union, there being no certification by the Board, or provision for certification by the Board, that at least a majority of said eligible employees voting in the most recent election as provided in Section 9, Subsection (3) of the Act, had voted to authorize the Union to make an effective union shop contract." Paragraph IX-B charged that "On or about July 6, 1948 and thereafter, the Union and the employees of the Companies engaged in a strike, work stoppage and/or concerted refusal to perform services for the Companies because of the Companies' refusal to enter into the agreement referred to in paragraph IX-A." Paragraph IX-C charged that "On July 13, 1948, after the Companies decided to yield to the demands and insistence of the Respondents in order to facilitate the immediate resumption of the production of bituminous coal, the Respondents entered into the agreement described in paragraph IX-A with the Companies, which agreement contained the union shop clause referred to therein, which, as aforesaid, does not conform with the requirements of the

Act, and which agreement and clause at all times since said date has been and is being maintained by the Respondents in full force and effect." Paragraph IX-D charged that petitioners, by the conduct described in paragraph IX-C, have restrained and coerced and are restraining and coercing employees in the exercise of rights guaranteed in Section 7 and did thereby engage in and are engaging in unfair labor practices within the meaning of said Section 8, subsection (b)(1)(A), and caused and attempted to cause and are causing and attempting to cause the Companies to discriminate against employees in violation of said Section 8(a)(3), and did thereby engage in and are engaging in unfair labor practices within the meaning of said Section 8(b)(2).

Petitioners' Motion to Dismiss was made applicable to the complaint, as amended (R. 85). Also to the complaint, as amended, petitioners' counsel offered petitioners' answer to the complaint as originally filed, and answered in substance as follows: (R. 81-84).

Petitioners admitted that on June 25, 1948, Union and representatives of the bituminous coal producers, other than the Companies, entered into an agreement effective July 1, 1948, which renewed and continued in effect certain provisions of the 1947 Agreement, based upon the 1941 Agreement, including the "union shop clause" requiring all employees covered by the agreement to be or become members of the Union. They denied that Board certification is requisite either in law or in fact. Petitioners denied that Union engaged in a strike as averred in section IX-B, and asserted that between July 6 and July 13, said employees in their own right and in protest to a refusal of said Companies to accept the 1948 Agreement, including the union shop, abstained from their work.

Petitioners denied the charges in paragraph IX-C and the averment therein that the Companies "yielded to the demands and insistence of the respondents," and they averred that there was no "demand" or "insistence" by them at

any time on July 9, 10, 11, 12 or 13, but that the settlement reached between the Companies and petitioners on July 13, was under the auspices and guidance of Justice T. Alan Goldsborough, Judge of the United States District Court for the District of Columbia, and that settlement was reached between the complaining companies through their representative, Harry M. Moses, and his counsel with petitioners, specifically providing for the execution by said Companies through their said representative, of the 1948 Agreement and that settlement so reached was voluntary and without insistence agreed to by Moses and his counsel in behalf of said Companies in the presence of said Court. Petitioners admitted that said Agreement "has been since that date and is now being maintained in full force and effect and not only by respondents but by all the complaining companies herein" and that if this be an illegal act or a violation of statute, which petitioners denied, then the Companies are equally participants with petitioners, and should be equally so charged by the Board. As to paragraph IX-D, petitioners denied the charges and statements therein and adopted as an additional answer thereto all the pertinent facts of the original answer. In further answer to paragraph IX-A, petitioners averred that the contract executed on June 25, 1948, is applicable only to the respective companies which signed the same and has no pertinency as to the complaining Companies, "the complainant companies having signed a contract of their own on July 13th."

Necessity of filing an amended written answer to the amended complaint was waived. (R. 188). At the conclusion of taking testimony, petitioners renewed their Motion to Dismiss upon the grounds stated therein, and as amended (R. 189) and also that the evidence was insufficient to sustain any charge. The Trial Examiner denied said Motion in his Intermediate Report (R. 49) and the Board affirmed that ruling (R. 30). Before the Board Petitioners asserted that Sections 8(a)(3)(ii) and 8(b)(2) conflicted with First, Fifth and Thirteenth Amendments to the Federal Constitution. (R. 267).

Petitioners filed a Motion, denied by the Board (R. 29), to strike said Report and Recommended Order and the record to remand the case for trial *de novo* before an Examiner legally and properly qualified under the Administrative Procedure Act, 1946. (R. 270).

C. Statement of the Facts.

The Companies, operators of "captive mines", produced approximately sixty million tons of coal in 1947, which was less than ten per cent of the coal produced in the bituminous coal industry. (R. 147).

On June 19, 1941, the Union and various coal companies (other than operators of "captive mines") executed a collective bargaining agreement known as the "Appalachian Joint Wage Agreement" (G. C. Ex. No. 2, R. 214-216). Subsequently, an agreement was executed by the captive mine operators, which, like the Appalachian Joint Wage Agreement, contained the following language (R. 128-129, 215) pertinent to the union shop issue in the present case:

> 1. "It is agreed that as a condition of employment, all employees shall be members of the United Mine Workers of America, except in those exempted classifications of employment as provided in this contract. (See Note)." (R. 215)
>
> 2. The note referred to reads thus:
>
> "NOTE: The amendments to the enabling clause of the Basic Agreement, covering recognition of the United Mine Workers of America, do not change the rules or practices of the industry pertaining to management. The Mine Workers intend no intrusion upon the rights of management as heretofore practiced and understood." (R. 215).
>
> 3. "Explanatory Memorandum:
>
> "Explanatory memorandum in re the Appalachian Wage Agreement dated May 12, 1939, made by John L. Lewis, President of the United Mine Workers of America, to the Appalachian Joint Conference, is also appended to this Agreement:

"The United Mine Workers of America agree that any expulsion or suspension from membership of an individual under the changed terms of the enabling clause of this Agreement shall be reviewed by the Executive Board of the International Union, United Mine Workers of America, before any individual employed is deprived of his employment.

"With reference to the sentence in the enabling clause stating 'that all employees shall 'be' members of the United Mine Workers of America, the word 'be' is used in its future tense, and the clause so noted becomes effective and operative after an individual has been employed and starts to work." (R. 216).

Since December 7, 1941, the captive mines have operated under a union shop agreement with the Union. (R. 120). The 1945 wage agreement between the Union and the bituminous coal industry, as well as the 1946 contract, between the Secretary of the Interior and the Union, each contained the union shop clause. Likewise, the National Bituminous Coal Wage Agreement of 1947 carried forward the provisions and terms of said 1941 contract, except as amended in the 1947 agreement and other intervening agreements, and included the Union Shop provisions of the 1941 contract.[3]

Consonant with the 1947 agreement (R. 94, 234) and pursuant to a letter from Lewis dated April 30, 1948, the "parties signatory"[4] convened a collective bargaining conference at the Shoreham Hotel, Washington, D. C., on May

[3] The National Bituminous Coal Wage Agreement of 1947 contains the following language: "It is further agreed that as a condition of employment, all employees shall be, or become, members of the United Mine Workers of America, except in those exempted classifications of employment, as hereinafter provided in this agreement." (G. C. Ex. No. 3-A). It carried forward also the provisions above-quoted, under the headings "Explanatory Memorandum" and "Note."

[4] Limitation of the term "parties signatory hereto" to "coal operators" and exclusion of coal associations by the Examiner (Intermediate Report, R. 52), is erroneous.

18, 1948, "to negotiate a successor contract" (G. C. Ex. No. 5, R. 234). The Companies were represented there by Harry M. Moses, President of the H. C. Frick Coal Company and United States Coal and Coke Company, who represented the captive mines in 1941 and in each collective bargaining conference thereafter. (R. 93, 95).

On June 9, the Union made the following offer to the bituminous coal operators (G. C. Ex. No. 7, R. 237):

> "In order to reassure the nation and to insure an adequate supply of coal after July 1, the United Mine Workers of America proposes as follows:
>
> "1. Subject to acceptance by the bituminous coal operators and the approval of the Mineworkers' National Policy Committee, the negotiating representatives of the United Mine Workers of America will recommend that all bituminous coal mines remain in operation after the end of the vacation period on July 6, 1948, under the terms, conditions and rules of existing agreements, pending negotiation of a successor contract; with the understanding that any changes or improvements negotiated, affecting wages or conditions of employment, will be made retroactive to July 1, 1948, inclusive, provided:
>
> "a. That this arrangement may be subject to cancellation by either party thereto, upon five days' notice.
>
> "b. That the bituminous coal operators will cause their trustee representative on the United Mine Workers Welfare and Retirement Fund, under the existing contract, to permit forthwith the administrative activation of said Fund, and that the business of the Fund and the disbursements of its monies be governed in all matters by the majority decision of any of its three trustees; namely, Messrs. Bridges, Van Horn and Lewis, or their respective successors."

At a later time (R. 132), on the same day, the coal operators, including the captive mine group, issued, through Charles O'Neill, their spokesman, a statement of policy (G. C. Ex. No. 6, R. 235), wherein there was stated in part:

> "Our present contract contains a union shop provision. Because of the Labor-Management Relations Act, 1947, this provision cannot be carried into the new agreement without first following the requirements of the law. This means that before any such clause can be made effective, the National Labor Relations Board must certify that at least a majority have voted to authorize the union to make such an agreement. The operators, however, are willing to insert into the contract a union shop provision to become effective when and to the extent permitted by law."

There was then pending in the United States District Court for the District of Columbia a proceeding instituted by coal operators concerning provisions in the 1947 Agreement relative to activation of the pension fund. On June 15, 1948, "The operators informed the United Mine Workers that there was no further use of continuing these negotiations until some significant thing occurred to change the viewpoint of one side or the other in the negotiations and left the negotiations and advised the public and various agencies of Government of their inability to make a contract with the United Mine Workers at that particular time." (R. 100). Moses stated this dispute related to the Welfare Fund. (R. 101).

On June 17 and 18, 1948, efforts of the Federal Mediation Service having failed, the President of the United States, advised of the disagreement between the Union and the coal industry, by Executive Order created a Board of Inquiry "to look into the dispute". (R. 102). The coal operators' representatives stated their case to that Board on June 21. A decision in the litigation above-mentioned, rendered by District Judge Goldsborough on June 22, was favorable to "public trustee" Bridges and "United Mine Workers' trustee" Lewis (R. 102). Later the same day the Union appeared before the Board, where Lewis stated the Union's case and "pointed out that a great many of the problems that existed to date were now out of the way, to which Mr. O'Neill, as spokesman for the operators,

agreed." (R. 102). At the Board's suggestion, the coal operators and the miners met in collective bargaining negotiations at 8 o'clock that evening. The Union indicated it desired a reduction from eight to seven hours in work time by shifts, an increase in wages, double pay for work on Saturdays and Sundays, and an increase in the amount of money "going into the Welfare Fund of the United Mine Workers Welfare and Retirement Fund."[5] (R. 103, 171).

On the morning of June 23, another conference was held. The Union asked for an opportunity to meet with its Policy Committee. (R. 103). Meanwhile, the coal operators had met and agreed that a smaller group, consisting of three members (Charles O'Neill, George Love and George Campbell) (R. 104), should "explore the range wherein which a contract could be made, and cost-wise to determine with the United Mine Workers, if possible, the necessity for making a contract with them, both economically and otherwise."

At approximately five o'clock in the afternoon of June 23 the Board of Inquiry was advised that substantial progress had been made toward agreement. Thereafter (R. 104-105) the subcommittee[6] reported to the other operators' representatives that they had had a meeting with Union representatives; that Mr. Lewis had withdrawn his demand for reductions in working hours per shift; and that his "rock bottom price for the other things was a dollar a day for every classification across the board and an increase from 10 cents to 20 cents per ton, in the payment entered in the United Mine Workers Welfare and Retirement Fund." (R. 104).

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[5] The Union, in executing the National Bituminous Coal Wage Agreement of 1948, both with the commercial operators and with the captive mine operators, relinquished their requests for shortening of the work day and double pay for Saturdays and Sundays.

[6] Moses denied that the group of three was a sub-committee (R. 134); but in his affidavit of July 7, 1948, he stated that "on Wednesday, June 23, 1948, there was appointed from the committee of representatives of employers a subcommittee of three persons." (R. 195).

On June 24, the subcommittee (to which Joseph E. Moody, representative of the Southern Coal Producers Association, had been added at his insistence) met with representatives of the Union; and Union's counsel, together with Moody's counsel, John C. Gall, met to explore means of solving the union shop problem. At five o'clock on the afternoon of June 24, the operator and Union representatives met again with the Board of Inquiry. The transcript of the proceedings before the Board of Inquiry at the five o'clock meeting on June 24 (G. C. Ex. No. 8, R. 238-243), shows unequivocally that all matters of major magnitude involved in the new agreement had been disposed of and agreement thereon reached, and such proceedings record Moses' approval thereof as representative of the captive mine group.

The transcript shows Lewis' statement to the Board of Inquiry that "we have reached an agreement in principle on all matters of major magnitude involved in the new agreement (R. 239), and the concurrence in that statement by O'Neill, coal operators' spokesman, who stated further that "subject to clearing up these minor details, we are ready to go ahead and execute this agreement tonight." (R. 239).

At this time, Moses stated to said Board that "we accept our minority role here and reluctantly consent to go along with the general picture." (R. 240).

Further, Board of Inquiry member Cole asked:

> "Does either side see any reason why this Board should not file its report tonight and say just what you have told us now, *that the parties have reported to us that they have agreed on all major provisions*, that the remaining provisions are more a matter of detail and that they all express confidence that those items will be ironed out and embodied in the contract which will be signed?" (Italics supplied: R. 243). Moody replied: "It is my understanding that that is the purpose of our report." (G. C. Ex. 8, R. 243).

Gail admitted (R. 172), that a drafting committee was designated to put in writing the wording of the contract for signatures the following morning.

On June 25 Union and operators met "to read the contract as it had been drafted, * * * and approve it, or disapprove it, or amend, review and refine it." (R. 108). In private conversation with Lewis, Moses discussed the union shop issue. He quotes Lewis saying that any change in "that clause" would be taken as an "abandonment of the union shop principle by the United Mine Workers", and he felt that he "couldn't afford to do that." (R. 108). Moses admitted that Lewis made "reference to the fact that he had a tentative agreement about that contract by a large majority of the industry". (R. 136).

Moses directed attention in the joint conference that they had projected the union shop clause as "it existed in the 1947 contract, into the 1948 contract". An affirmative reply from operators was followed by Moses' rejection of the contract because of the union shop clause. The contract then was signed by some of the commercial operators and Union. (R. 109, G. C. Ex. 3-B, R. 217).

Execution of the 1948 Agreement followed a resolution of Union's Policy Committee authorizing execution thereof. (Respondent's Exhibit No. 3, R. 252, also R. 239). This authorization is consonant with the authority vested in the Policy Committee of the Union at the Union's Scale and Policy Convention, held October 1-4, 1946, in Atlantic City, New Jersey, in accordance with Article XII of the Union's Constitution (Respondent's Ex. No. 2, R. 251), and composed of representatives from all mines, in addition to representative officers, and where the Convention adopted the Report of the Scale Committee (R. 178-179), which provided that the Policy Committee be clothed with authority to deal with all matters in the making of the next basic wage agreement (R. 180-181), and among the proposals which the Policy Committee was directed (by use of the mandatory term "shall") to make was "consolidation of

all benefits accruing from the present agreements." (R. 182). This report gave the Policy Committee and the Negotiating Committee "an opportunity to handle every demand that was made by the local unions in their resolutions." (R. 180).

A telephone call from Moses to Lewis on June 28, effected a post-prandial meeting, at which Moses suggested that "Perhaps by an exchange of letters of some sort, we might modify the contract to make it legal", and Lewis stated he "would like to think over, the suggestion I had made about an exchange of letters". (R. 111). Another meeting on June 30, or July 1, 1948, in New York City resulted in a meeting between counsel for the captive mines group (William Foster and Roger Blaugh), and Union's counsel (Welly K. Hopkins). (R. 112, 149). Foster and Blaugh placed upon paper their ideas of what they thought would solve the problem; (G. C. Ex. 14, R. 151) and Hopkins put in writing ideas which he had. (G. C. Exs. 15, 16, R. 152, 155, 248-249). There is agreement that their suggestions had not been discussed with their respective principals and therefore were not binding. (R. 156). They interchanged their proposals. Hopkins' proposed draft of the checkoff authorization card was satisfactory to Lewis. (R. 156). The portion thereof which pertains to the union shop clause is as follows (See G. C. Ex. No. 16, R. 153, 248).

> "* * * By this authorization I do hereby specifically authorize, approve, ratify and affirm the negotiation for me and in my behalf by the International Union, United Mine Workers of America, of the National Bituminous Coal Wage Agreement of 1947, and the union shop provisions therein contained and any and all extensions thereof which have heretofore been or which may hereafter be negotiated in my behalf."

Upon Blaugh's statement that "that was not satisfactory", the interview terminated, and Foster then left New York for Washington to participate in the filing of the instant unfair labor practice charges. (R. 156).

Foster admitted that Hopkins' reaction to the proposals of Foster and Blaugh (G. C. Exhibit 14) was that Hopkins "felt that it was an abrogation or total suspension of the union shop, that had obtained through the years since 1941 and on down." (R. 157). Nor did he deny Hopkins' assertion of the Union's position that the execution of the 1948 Agreement under the Hopkins proposal would not be an illegal act. (R. 158).

The Agreement of 1947 expired on June 30, 1948. The miners' vacation period extended from June 26 to the morning of July 6. Prior to the expiration of the vacation period the Companies represented by Moses and several other companies posted notices to their employees, offering employment to the mine workers on the basis of increased wages and royalty payments into the United Mine Workers of America Welfare and Retirement Fund as contained in the 1948 Agreement and stating a willingness "to accept the other provisions of the new Wage Agreement and the Union Shop provision provided it does not become effective until authorized in the manner specified in the law." (G. C. Ex. 10, R. 113, 244).

Moses testified that when the miners' vacation period ended on July 6, they did not return to work at captive mines. (R. 114).

On July 8, a conference between Moses and Attorney Gall, representing the captive mine owners, and Hopkins, representing the Union, arranged by the Federal Mediation Service ended "without any results." (R. 115). During this conference, the complaint in this proceeding was issued, and the Board's Regional Director, Fifth Region, sought an injunction in the United States District Court for the District of Columbia against petitioners (R. 172) in connection with the instant unfair labor practice.

Witness Moses testified that about noon on July 9, Gall called him and advised him that District Judge T. Alan Goldsborough "would like to see Mr. Gall and myself and counsel for the United Mine Workers, Mr. Hopkins, in his

chambers at 2:30 in the afternoon"; that the parties responded to such call and that on the afternoon of July 13, a decision was reached to sign the National Bituminous Coal Wage Agreement of 1948, predicated on the stipulation which was to be signed simultaneously with the contract. (R. 115-116).

Execution of the 1948 Agreement by the Companies was admitted by Moses, in a public statement (R. 249, Resp. Ex. 1), to have been "under the guidance of Judge Goldsborough". Moses admitted that all conferences leading up to the Companies' signing the 1948 Agreement were held in the Chambers of District Judge Goldsborough and in his presence at all times. (R. 138). The contract was signed on the afternoon of July 13 in Mr. Lewis' office. (R. 143). The contract signed by the captive mine operators is a "different physical document from the document signed by the other operators." (R. 118). The petition for the injunction above-mentioned was withdrawn. (R. 148, 185-186). In response to the inquiry whether Moses' "going to that building to execute the contract" was voluntary, Moses replied, "Yes, sir." (R. 143).

When the 1948 Agreement was executed between the Union and Companies, they stipulated (G. C. Ex. 11, R. 245), among other matters, that "Hearings, reports and appeals" involved in the instant proceeding "shall take the usual and normal procedure provided by statute and the rules and practices of the Board until this cause shall have been processed to final conclusion"; and that the 1948 Agreement "shall be effective and fully operative from July 1, 1948, to June 30, 1949, subject to a final decision of the court of last resort to which any party may appeal".

There is agreement between counsel for the parties to the stipulation that it was not in the nature of an amendment to the 1948 Agreement and that it was entered into in good faith. (R. 173).

At the same meeting Lewis directed to each District President of the Union having captive mine operations a

telegram advising them of the execution of the 1948 Agreement by the Companies and directing them immediately to notify the miners at all mines affected to report to the first available shift desired by the company.

REASONS FOR GRANTING THE WRIT.

1. Sections 8(a)(3)(ii) and 8(b)(2) of the Act and the Board's Order, as complained of by petitioners, are void because they are in conflict with the First, Fifth and Thirteenth Amendments to the Constitution of the United States.

The right of mine workers to form and maintain a Union is a fundamental right, constitutionally guaranteed (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 263) and protected (*West Virginia* v. *Barnette*, 319 U. S. 624, 638). The right to bargain collectively is likewise a fundamental right protected by the Fifth Amendment to the Federal Constitution. 11 Am. Jur., Subject, Constitutional Law, Sections 339, 341. An indispensable element of these fundamental rights is Union membership as a condition of employment. By enactment of Sections 8(b)(2) and 8(a)(3)(ii), Congress has restrained the exercise of such fundamental rights by imposing arbitrary and unreasonable restraints. That there was no necessity therefor has been conclusively demonstrated by labor's almost unanimous approval of union shops in authorization elections. Labor Relations Reporter, (24 Analysis 73, September 5, 1949) reports: "Union's victories closely approached one hundred per cent."

2. These rights are interfered with, denied and curtailed by the Court of Appeals' decree and by the Board's order. Under Paragraph 1(b) of the decree and order the right of individual mine workers to abstain from work is banned. It denied to petitioners the right of strike action. The

Board has placed responsibility for the alleged strike action by individual coal miners upon Union. If Union did no overt act with reference to the alleged strike action (as the Board admits), Union responsibility must stem from the mass action of its membership. Responsibility, therefore, is premised upon agency. Since an unfair labor practice may be committed by a Union's "agents", and since the Board's Order is directed against Union's agents, the effect of the Board's order is that not only are the mine workers charged with discriminating against themselves, but Paragraph 1(b), relating to strike action, is directed against the mine workers themselves, and would compel them into involuntary servitude in conflict with the Thirteenth Amendment to the Federal Constitution (*Stapleton* v. *Mitchell*, 60 F. Supp. 51; *Pollock* v. *Williams*, 322 U. S. 4; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 256) and destroys and challenges not only their right to abstain from work but all rights correlative thereto. It destroys the miners' and petitioners' rights to utilize their economic power of withholding services, even when there is no contractual obligation for them to work. It reduces the bargaining power of mine workers to the position of an individual, who, according to judicial declaration "was helpless in dealing with an employer." *American Steel Foundries* v. *Tri-City Central Trade Council*, 257 U. S. 184. It reduces free collective bargaining to a mere mockery, and is violative of *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 534, which denounced a statutory provision providing that a laborer could "not agree with his fellows to quit or combine with others to induce them to quit."

3. Like the statutory provisions, the Court's decree and the Board's order, as complained of herein, is an arbitrary and unreasonable restraint upon petitioners' and the mine workers' rights of collective bargaining, and is therefore unconstitutional and void.

4. The Order likewise denies petitioners and the miners the right of free speech, the right to picket, the right to persuade members by speech or print to cease work peaceably, guaranteed by the First Amendment to the Federal Constitution. *Thomas* v. *Collins*, 323 U. S. 516; *Thornhill* v. *Alabama*, 310 U. S. 88. It denies also freedom of assembly for the discussion of matters concerning collective bargaining. The right of an individual worker to leave his employment includes the right to induce others to join him, and to indicate to others such joint action. These rights are denied to the mine workers and petitioners. Nor is there any showing of a clear and present danger which is necessary to curtail constitutional rights. *Schenck* v. *United States*, 249 U. S. 47; *Bridges* v. *California*, 314 U. S. 252. The Board's order involves Section 8(b)(2), and Section 8(a)(3)(ii). The validity of these statutory provisions must be tested by their *operation and effect*. *Near* v. *Minnesota*, 283 U. S. 697. "In approaching cases . . . in which federal constitutional rights are asserted, it is incumbent . . . to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect." *Oyama* v. *California*, 332 U. S. 633, 636. The Court's and the Board's application of said statutory provisions results in denial of constitutional rights. Both the Order and the statutory provisions collide with the First, Fifth, and Thirteenth Amendments to the Federal Constitution, and are therefore void. *American Federation of Labor* v. *American Sash & Door Co.*, 93 L. ed. (Adv. op.) 209, (and the companion case of *Lincoln Fed. Labor Union* v. *Northwestern Iron & Metal Co.*, 69 S. Ct. 251) relied upon by the Board to sustain its position that the statutory provisions are constitutional, is not in point. In a concurring note by Mr. Justice Rutledge (p. 219) he noted that "the right to strike or concerning the effect of the Thirteenth Amendment" was not presented. Because the statutory provisions are void, the Board was without jurisdiction and power to entertain a proceeding thereunder.

5. The United States Court of Appeals and the Board have misinterpreted and misapplied the statutory provisions herein involved. In so doing they have ignored pertinent language contained in collective bargaining agreements obtaining since 1941 and have reached a result which challenges the right of coal miners as free men who authorized and approved petitioners' request for a union shop. To do so, the Court and the Board committed prejudicial error in the admission and rejection of evidence; they have made findings and conclusions of law without supporting factual basis; they have utilized incompetent evidence and ignored binding judicial precedents and legislative history of the Act and denied petitioners an indispensable element of the constitutionally guaranteed right of collective bargaining, the right to strike and other rights correlative thereto, and have ignored uncontradicted pertinent evidence.

6. The Decree and Order violate the First, Fifth and Thirteenth Amendments, as do the statutory provisions. The Decree and Order are likewise violative of Sections 7, 13 and 502 of the Act. The Board was without jurisdiction to act in this case. It assumed jurisdiction and power beyond that which Congress has granted in Section 10 of the Act.

7. The Court of Appeals erred in relying upon *National Labor Relations Board* v. *National Maritime Union*, 175 F. (2) 686, Second Circuit, decided July 1, 1949; C rt. Denied, 338 U. S. 954 (1950), as authority for their opinion and decree in this case. The Maritime case is not determinative of the issues in the instant case. The instant case involves interpretation and application of provisions of the Labor-Management Relations Act, 1947 which are federal questions of substance and general importance which have not been, but should be, settled by this Court.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Labor Management Relations Act, 1947: (61 Stat. 136 et seq.)

Section 7. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this title."

Section 8. "(a) It shall be an unfair labor practice for an employer—

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization * * * (ii) if, following the most recent election held . provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: * * *"

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) * * *"

(4) —to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person

to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, * * *"

"(d) * * * Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

* * *

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: * * *" 61 Stat. 140-143.

Section 9. "(e) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in subsection 9(a) of this section, of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer." 61 Stat. 144.

Section 10. "(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *"

"(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act; * * *" 61 Stat. 146.

Section 13. "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to effect the limitations or qualifications on that right." 61 Stat. 151.

Section 502. "Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; * * *" 61 Stat. 162.

Administrative Procedure Act (60 Stat. 237-244)

"Section 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners * * *, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. * * * For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpoena witnesses or records, and pay witness fees as established for the United States courts." 60 Stat. 244.

Constitutional Amendments:

The First Amendment to the Constitution of the United States reads, in part, as follows:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the Constitution of the United States reads, in part, as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Thirteenth Amendment to the Constitution of the United States provides, in part, as follows:

> "Sec. 1—Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> "Sec. 2—Congress shall have power to enforce this article by appropriate legislation."

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 497

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, AND JOHN L. LEWIS, PRESIDENT OF SAID UNION, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 276-279) is reported at 184 F. 2d 392. The findings of fact, conclusions of law, and order (R. 29-69) of the National Labor Relations Board are reported at 83 NLRB 916.

JURISDICTION

The decree of the court below was entered on October 19, 1950 (R. 282). The petition for a writ

of certiorari was filed on January 15, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether the Board's findings that petitioners insisted, as a condition to entering into a contract with the operators of "captive" coal mines, upon incorporation in the contract of a union-shop clause without following the statutory authorization election procedure, supported this demand by strike action, and caused the operators to accede to this demand, are supported by substantial evidence.

2. Whether compliance with the authorization election procedure is rendered unnecessary by a showing that all persons presently employed are members of the union and an offer to produce cards signed by such employees approving the execution of a union-shop contract.

3. Whether, in the absence of a complaint by a specific employee or group of employees that there has been discrimination against him or them, the Board may properly find that petitioners attempted to cause and caused the mine operators to discriminate against employees within the meaning of Section 8 (a) (3), in violation of Section 8 (b) (2).

4. Whether the restrictions imposed by Section 8 (a) (3) and Section 8 (b) (2) of the Labor Management Relations Act upon labor organiza-

tions and their agents deprive such parties or the employees of any constitutionally protected rights.[1]

STATUTE INVOLVED

The pertinent provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*), are set forth in the Appendix, *infra,* pp. 17-21.

STATEMENT

Upon the usual proceedings under Section 10 of the National Labor Relations Act, as amended, the Board, on May 27, 1949, issued its findings of fact, conclusions of law and order (R. 29-69). The pertinent facts, as found by the Board and shown by the evidence, may be summarized as follows.[2]

Jones & Laughlin Steel Corporation and the 17 other companies here involved, complainants before the Board, produce 85% of the nation's

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[1] Petitioners' question numbered "2B", which complains of Board rulings on admission of evidence (Pet. p. 4), does not specify any particular ruling and affords no basis for review by this Court. Likewise, petitioners' question numbered "2D" (*ibid.*) fails to disclose the basis for petitioners' claim, which is nowhere further discussed in the petition, that the case should have been dismissed as moot. Petitioners' question numbered "2H" (Pet., pp. 4-5), which complains of the Board's failure to set aside the Intermediate Report because of alleged subsequent disqualification of the Trial Examiner by a Board of Consultants of the Civil Service Commission, presents no issue warranting review by this Court. The Board was clearly correct in denying petitioners' motion for the reasons stated in its opinion (R. 29-30, note 1), as the court below, in affirming the Board's order without even mentioning this objection, held.

[2] In the following statement, the references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

annual supply of basic steel. They operate so-called "captive" bituminous coal mines, mainly for their own use, in Pennsylvania, West Virginia, Kentucky, Alabama, Ohio and Utah. (R. 50; 85-86, 92-93, 200, 206).

On July 8, 1947, International Union, United Mine Workers of America, hereinafter called the Union, the captive-mine operators and certain operators of commercial mines made an agreement known as the National Bituminous Coal Wage Agreement of 1947, covering the period from July 1, 1947 to June 30, 1948 (R. 52; 91, 93, 131, 221-234). Continuing a contractual arrangement which had been in effect between these parties since 1941 (R. 51, 57; 86, 120, 128-129, 214-216), the agreement provided as to the employees therein covered as follows (R. 52; 91, 222):

> It is further agreed that as a condition of employment all employees shall be, or become members of the United Mine Workers of America. * * *.[3]

On August 22, 1947, the amendments to the National Labor Relations Act became effective. One of these amendments, attached to the proviso to Section 8 (a) (3), reads: "That nothing in this Act * * * shall preclude an employer from making an agreement with a labor organiza-

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[3] The above provision and similar provisions are hereinafter referred to as "union shop" agreements, in contrast to "closed shop" agreements which require pre-existing union membership as a condition of obtaining employment.

tion * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment * * * if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement".[4]

On May 18, 1948, the signatories to the agreement attended the first of a series of meetings held for the purpose of negotiating a new contract (R. 52; 94-95, 234-235). On June 9, the Union first indicated its intention of continuing the union-shop provisions in effect without complying with the election procedure prescribed in Section 8 (a) (3) of the amended Act. The Union proposed that if the operators would agree to activation of the welfare fund [5] and to abide by a majority decision of the three trustees administering that fund, the Union, "in order to reassure the nation and to insure an adequate coal supply after July 1," would "recommend that all bituminous coal mines remain in operation after the vacation period on July 6, 1948," under the terms of the existing agreement,

[4] The 1947 contract was not affected by this provision because of the saving clause in Section 102 of the amended Act, which exempted union shop contracts of one year duration, executed before the effective date of the amended Act, if made in conformity with the provisions of Section 8 (3) of the Wagner Act.

[5] Issues arising out of administration of the welfare fund were then being litigated in the District Court (R. 53; 98, 100-101).

subject to cancellation on 5 days' notice, pending the negotiation of a successor contract (R. 53; 98-99, 101, 237). Later the same day, the operators issued a statement of policy concerning the union-shop provision. They pointed out that because of the amended Act the current union shop clause could not lawfully be continued in the new agreement without prior certification by the Board "that at least a majority have voted to authorize the union to make such an agreement" (R. 53; 99-100). The operators declared their willingness "to insert into the contract a union-shop provision to become effective when and to the extent permitted by law" (*ibid.*).

On June 22, the welfare fund controversy, which had blocked all progress, was ended by a decision in the District Court litigation, note 5, *supra* (R. 54; 100-101, 102). Negotiations resumed that evening (R. 54; 102-103). Two days later, the parties reached substantial agreement on practically all matters except the union shop issue (R. 54; 104-105, 107, 161-168, 241-242).

On the next morning, June 25, Harry M. Moses, representing the captive-mine owners, telephoned John L. Lewis, the Union's president, and told him that the Union's insistence upon the union shop provision was making it impossible for the captive-mine owners to sign the contract (R. 51, 54; 79-80, 92, 107-108, 201, 206, 235). Lewis expressed regret but said that he had reached agreement with the rest of the industry and was not inclined to

make any changes (R. 54; 108). Later that morning, while the Union and the operators were discussing the current draft contract, Moses conferred privately with Lewis (*ibid.*). Moses tried to persuade Lewis to modify the union shop clause so that it should not be immediately binding but effective only when and to the extent permitted by law, as the captive-mine owners had proposed on June 9 (*ibid.*). Lewis rejected this proposal. He said that a large part of the industry had already agreed to include the 1947 provision and that any change in it would be taken by the miners and the public as an abandonment of the union shop principle (R. 54-55; 108, 136).

When Moses returned to the conference, he found that the union-shop provision of the 1947 agreement was being included in the draft with the approval of the commercial operators. Moses thereupon withdrew, stating that the captive-mine operators would not sign a contract containing the union-shop clause without the condition he had suggested (R. 55; 108-109). The commercial operators remained and signed (R. 55; 109-110, 173-174).

On June 26, the day after the stalemate between the captive-mine operators and the Union, the miners left on their annual vacation which was scheduled to end at midnight, July 5 (R. 55; 112-113). On June 28, in the hope of concluding an agreement, Moses again conferred with Lewis (R. 55; 111). At this conference, Lewis expressed

regret at what he considered the foolish position of the captive-mine group and pointed out "the expensive course it might take" (R. 33; 111). On June 30, while the miners were still on vacation, the 1947 agreement expired.

On July 1, at another conference convened by Moses (R. 55; 112, 149-158), the Union offered to have the employees sign check-off authorizations approving the union-shop provision; it remained adamant however upon inclusion of an unconditional union-shop provision in any new contract, despite the lack of authorization in a Board-conducted election (R. 55; 112, 149-158, 248-249).[6]

Thereafter, prior to expiration of the miners' vacation period, the captive-mine owners posted notices at their mines stating that they would comply with the terms of the agreement between the Union and the commercial operators with respect to increased wages and the increased royalty payable into the welfare fund (R. 55-56; 113-114, 244, 245). The notices further stated that although the captive-mine operators had not signed the agreement because of the union-shop provision, they were willing to accept the other provisions and

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[6] At a conference on July 8 between representatives of the Union and the captive-mine operators, arranged by federal mediators, the Union again suggested that the union-shop provision become effective upon presentation of written authorizations executed by the individual employees (R. 56; 168, 170, 149-152, 248-249). The Company again rejected this proposal on the ground that it did not accord with the Act (R. 56; 115, 169-171, 155).

also the union-shop provision provided that the latter did not become effective until authorized as provided in the Act (*ibid.*).

On July 6, when the stipulated vacation period ended, no employees of captive-mine operators reported for work (R. 55-56, 61; 113, 114, 169). The Union's publicly announced "historic and automatic procedure" was "No contract, no work" (R. 32, 61; 110, 126, 127, 244, 247).[7]

On July 8, the Board, pursuant to a charge filed by the operators, issued the complaint initiating its proceedings in this case (R. 56; 80, 199-204). Pursuant to Section 10 (j) of the statute, the Board also filed a petition for injunctive relief against the alleged unfair labor practices in the District Court for the District of Columbia (R. 56; 114).

On July 9 and 13, in connection with the injunction proceedings, company and union representatives conferred with Judge Goldsborough in his chambers (R. 56-57; 115). At the July 13 conference these parties entered into a stipulation reciting that they desired immediate resumption of coal production in the captive-mines, and providing that the unfair labor practice proceedings before the Board should continue without waiver of any

[7] During 1944, the Union stated in its official publication, the *United Mine Workers' Journal* that the automatic applicability of the "no contract, no work" policy made it unnecessary for the Union ever to issue a specific strike order. "No contract, no work. No stoppage order ever goes out. If the new agreement has not been signed before the expiration of the old, the men quit." (R. 32, n. 8; 247, cf. 244).

rights by either side to test the validity of the union-shop provision and further providing that the National Bituminous Wage Agreement of 1948 should be in full force and effect in the captive-mines, subject to final decision in the unfair labor practice case by a court of last resort (R. 31, 57; 116, 117, 245-246).

On that afternoon the parties executed the contract, including the 1947 union-shop provision (R. 57; 81-82, 87-91, 118-119, 143, 212-213, 217-222). Lewis thereupon wired the Union's district officers in the captive-mine areas, advising that the agreement was signed and directing them at once to notify all miners in the mines affected to report for work on the first available shift (R. 57; 119). Lewis' back-to-work order, so relayed to the Union's membership, was immediately obeyed (*ibid.*). The miners promptly appeared for work at the captive-mines, some of them on later shifts that very same day. All mines were back in operation within 48 hours (*ibid.*). The petition in the injunction suit was withdrawn (R. 57; 147-148, 185-186). No union-shop authorization election under Board auspices has ever been held (R. 61; 81-83, 188-189, 212-213).

In its decision the Board found that petitioners had insisted upon the companies' acceptance of the union-shop provision, without compliance with the statutory authorization election procedure, as a condition for concluding an agreement; that the Union had resorted to strike action to support this

demand; and that the Union had thereby attempted to cause and had in fact caused the companies "to execute an agreement containing an invalid union-shop provision and thus to discriminate against employees within the meaning of Section 8 (a) (3) of the Act," in violation of Section 8 (b) (2) (R. 30-34, 57-58, 61-62, 65).

The Board ordered petitioners to cease and desist from "requiring, instructing, or inducing" the Union's representatives to require the complainant companies to execute union-shop contracts except in accordance with the provisions of Section 8 (a) (3) of the amended Act, from "directing, instigating, or encouraging employees to engage in a strike or approving or ratifying strike action taken by employees for the purpose of requiring that the Companies execute contracts" containing union membership provisions except in accordance with such statutory provisions; from "causing or attempting to cause the Companies to execute contracts" containing the provisions so prohibited, or in any other manner to discriminate against employees within the meaning of Section 8 (a) (3) of the Act; and to post appropriate notices (R. 37-40).

On June 6, 1949, petitioners filed a petition to review the Board's order in the court below (R. 2-28). On July 17, 1950, the court entered its opinion (R. 276-279) and decree (R. 280-284) enforcing all but one of the provisions of the Board's

order.[8] The court rejected petitioners' contentions that Section 8 (b) (2) of the amended Act "is limited to discrimination against a *specified* employee or group; that an election under Section 9 (e) (1) was unnecessary as the mine employees had otherwise approved the union-shop agreement; that the Board's finding of resort to strike action in support of [the Union's] demand for the union-shop provision was not supported by the evidence; and that the Board's order violated constitutional rights guaranteed by the First, Fifth and Thirteenth Amendments" (R. 278).

ARGUMENT

1. The facts set forth in the Statement, *supra*, pp. 3-12, clearly support, and petitioners do not challenge, the Board's finding that petitioners insisted, as a condition of executing a contract, upon inclusion of a union-shop clause notwithstanding noncompliance with the statutory authorization procedure. That finding alone warrants the Board's conclusion that petitioners violated Section 8(b)(2) of the Act. Cf. *National Labor Relations Board* v. *National Maritime Union*, 175 F. 2d 686, 689 (C. A. 2), certiorari denied, 338 U. S. 954.

Petitioners challenge only the propriety of the Board's additional finding that they resorted to

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[8] This provision enjoined petitioners from giving effect to the union-shop clause in the 1948 contract so long as the provisos in Section 8 (a) (3) of the Act were not complied with (R. 38). The court below, noting that the 1948 agreement had expired, held this provision moot (R. 279, 280-281).

strike action to support their illegal demand (Pet. pp. 24-25). Petitioners argue that since they issued no strike call, they may not be held responsible for the failure of the union members to report to work at the expiration of the vacation period, the contract having expired. But this argument overlooks entirely the Union's maintenance of its "no contract, no work" policy, which operates automatically to produce a strike whenever there is "no contract"; and which, as the Union itself has pointed out, renders overt strike calls entirely unnecessary. See note 7, p. 9, *supra*. Having adopted such a policy, the Union can no more escape responsibility for its consequences than can one who sets a spring gun escape responsibility for its firing on the ground that he did not pull the trigger.

The facts set forth in the Statement, *supra*, pp. 3-12, leave no room for doubt that, as the Board and the court below found (R. 31-33; 278), it was the Union's "no contract, no work" policy which was responsible for the concerted action of the miners in refusing to return to work until directed to do so by Mr. Lewis, after the contract incorporating the illegal provision on which he had unwaveringly insisted had been signed. In any event, the adequacy of the evidence to support the Board's finding in this respect presents no question of general importance warranting review by this Court.

2. Petitioners' contention (Pet. pp. 3, 9, 11,

20-22, 27), that the Union's offer to secure signed union-shop authorization cards from the mine workers, and the action of the miners in unanimously refusing to work without a contract incorporating such a clause, obviated the necessity of conforming to the election procedure prescribed by Sections 8 (a) (3) and 9 (e) (1) is without merit, as the Board and the court below held (R. 33-34; 278). The proviso to Section 8 (a) (3) authorizes union-shop agreements only upon strict compliance with the specific conditions deemed appropriate by Congress. See H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 41. One of these conditions, that majority approval be shown in a Board-conducted election, petitioners deliberately refused to meet. But Congress believed [9] that untrammelled expression of employees' wishes could best be obtained through the medium of Board-conducted elections, and consequently provided for the use of this medium exclusively. Cf. *National Labor Relations Board* v. *Appalachian Electric Power Co.*, 140 F. 2d 217, 222 (C. A. 4); *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 881 (C. A. 3); *Douds* v. *United Wire & Metal Workers Union*, 86 F. Supp. 542, 545 (S. D. N. Y.). On this point, no conflict of decisions exists or is claimed.

3. The contention (Pet. 3, 27) that Section 8

[9] 93 Cong. Rec. 3556, 3836-3837, 4284, 4879, A 2252, Legislative History of the Labor Management Relations Act, 737, 1010, 1150, 1408, 1524.

(b) (2) may not be held to have been violated in the absence of a claim of discrimination by a specific employee or group of employees has also been rejected by the Court of Appeals for the Second Circuit as having "no rational basis." *National Labor Relations Board* v. *National Maritime Union,* 175 F. 2d 686, 689 (C.A. 2), certiorari denied, 338 U. S. 954. For the reasons stated in our Brief in Opposition in that case, No. 488, October Term, 1949, pp. 14-17, to which we respectfully refer the Court, we submit that the holding of the Board and the court below on this point was clearly correct and warrants no further review by this Court.

4. Petitioners' claim (Pet. 4, 24-27) that Sections 8 (a) (3) and 8 (b) (2) of the amended Act, as applied by the Board, infringe rights guaranteed employees by the First, Fifth and Thirteenth Amendments is fully met by controlling decisions of this Court,[10] as both courts of appeals which

[10] As to the validity of restrictions upon the execution of union-shop agreements, see *Algoma Plywood Co.* v. *Wisconsin Employment Relations Board,* 336 U. S. 301; *Lincoln Federal Labor Union* v. *Northwestern Co.,* 335 U. S. 525; *American Federation of Labor* v. *American Sash Co.,* 335 U. S. 538. That an order like the instant one, which enjoins a labor organization from inducing or encouraging strikes for unlawful purposes, is not inconsistent with either the First or Thirteenth Amendments is also clearly established. *United States* v. *United Mine Workers,* 330 U. S. 258, 265-266, 268, note 14, 307; *United States* v. *Petrillo,* 332 U. S. 1, 12, 13; *International Union* v. *Wisconsin Employment Relations Board,* 336 U. S. 245, 251, 259-260; *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490; *Teamsters Union* v. *Hanke,* 339 U. S. 470; *Building Service Employees Union* v. *Gazzam,* 339 U. S. 532; *Hughes* v. *Superior Court,* 339 U. S. 460, 464-466.

have considered the specific question held. In addition to the decision below (R. 278-279, see *National Labor Relations Board* v. *National Maritime Union, supra,* 692 (C. A. 2).

CONCLUSION

The decision below is correct, and no conflict of decisions or question warranting review is presented. The petition for certiorari should be denied.

Respectfully submitted,

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FEBRUARY, 1951.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

> Sec. 8. It shall be an unfair labor practice for an employer—
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.
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> * * * * *

The relevant provisions of Titles I and V of the

Labor Management Relations Act, 1947,[1] are as follows:

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

FINDINGS AND POLICIES

SEC. 1. * * *

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

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[1] Other than those which appear in the petitioners' brief at Appendix A, pp. 29-32.

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have

jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony

upon which the order complained of was entered, and the findings and order of the Board. Upon such finding, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

TITLE V

DEFINITIONS

SEC. 501. When used in this Act—

* * * * *

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

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